FILE COPY

Office - Supreme Court, U.S.
FILED
FEB 23 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1939.

No. 722

FRANZ J. BORCHARD and FRIEDA W. BORCHARD,

Petitioners,

vs.

CALIFORNIA BANK, a banking corporation, and CALIFORNIA TRUST COMPANY, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LLOYD S. NIX,
830 Title Insurance Building, Los Angeles,
Counsel for Petitioners.

Parker Printing Company, Law Printers, Los Angeles.

SUBJECT INDEX.

PAGE

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit 1

Statement of the matter involved 2

Reasons relied on for allowance of writ 3

Brief in Support of Petition 5

(1) The opinions and decisions of the courts below 5

(2) Jurisdiction 6

(3) Statute involved 6

(4) Statement of the case 10

(5) Specification of errors 14

(6) Summary of the argument 15

Point I. While there is pending before the Conciliation Commissioner a proceeding to determine whether a stay order should issue pursuant to section 75 (s) of the Bankruptcy Act as amended, the court should not dissolve all restraining orders and, upon petition of a secured creditor, order debtors' farming land sold under deeds of trust upon the ground that debtors have no equity in the property and for more than three years have been unable to financially rehabilitate themselves 17

(a) Section 75 (s) provides for stay of proceedings for three years after compliance with provisions as to request to remain in possession and appraisal, during which time debtor shall retain possession, provided he pays reasonable rental 17

(b) A debtor adjudicated bankrupt under section 75 (s) is entitled to have his proceeding for relief entertained and his property dealt with in accordance with that subsection 19

PAGE

(c) Definite course of procedure is prescribed by section 75 (s) 19

(d) Provisions of the statute are mandatory 19

(e) Three-year period commences from making of order staying proceedings under section 75 (s) (2) 21

Point II. Appraisal of debtor's property having been made pursuant to said section 75 (s), and no objection or exception having been taken thereto, such appraisal and the amount thereof were binding on the court in passing upon the petition of secured creditor for leave to sell said property under its deeds of trust 23

(a) Section 75 (s) provides for appointment of appraisers and specifies rights as to objections, exceptions and appeals 23

Point III. In proceedings under section 75 (s) of the Bankruptcy Act, the District Court has no jurisdiction to grant the petition of a secured creditor to foreclose or sell debtors' farming land without the appointment of a trustee and sale of the property under the control of the court 26

(a) The filing of a petition for relief under section 75 of the Bankruptcy Act subjects the farmer and all his property to the exclusive jurisdiction of the Federal Court 26

(b) Upon the amendment of debtor's petition under section 75 (s) of the Bankruptcy Act, the rights and obligations of the parties are determined by the provisions of said section 75 (s) 26

(c) Section 75 (s) (3) provides the only method of liquidation 27

(d) Court has no jurisdiction to authorize sale before trustee is appointed 27

Conclusion 28

TABLE OF AUTHORITIES CITED.

CASES.

	PAGE
Adair v. Bank of America Nat. Trust & Sav. Assn., 303 U. S. 350, 58 S. Ct. 594, 82 L. Ed. 889	12
Bank of America Nat. Trust & Sav. Assn. v. Adair, 90 Fed. (2d) 751	13
Comer v. John Hancock Mut. L. Ins. Co. (C. C. A. 8), 80 Fed. (2d) 413	27
David, In re (C. C. A. 3), 33 Fed. (2d) 748, certiorari denied, 280 U. S. 514, 50 S. Ct. 19, 74 L. Ed. 585	25
De Tamble, In re, 88 Fed. (2d) 893	26
John Hancock Mutual Life Ins. Co. v. Bartels, 308 U. S. ——, 60 S. Ct. 221, 84 L. Ed. ——	3, 19, 22, 27
Kalb v. Feuerstein, ——, U. S. ——, 60 S. Ct. 343, —— L. Ed. ——	26
Lyders, In re (D. C., Cal.), 16 Fed. Supp. 213, affirmed 88 Fed. (2d) 9	24
Russell, In re (D. C., Cal.), 105 Fed. 501	24
Wright v. Vinton Branch of Mountain Trust Bank, 300 U. S. 440, 57 S. Ct. 556, 81 L. Ed. 736	12, 20, 21, 22, 26

STATUTES.

Bankruptcy Act, Sec. 2 (10) (11 U. S. C. A., Sec. 11 (10))	24
Bankruptcy Act, Sec. 39c	25
Bankruptcy Act, Sec. 75 (n)	26
Bankruptcy Act, Sec. 75 (s) (2)	2, 3, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 25, 26
Bankruptcy Act, Sec. 75 (s) (3)	16, 27
Judicial Code, Sec. 240a	6
General Order in Bankruptcy XXVII	24, 25

PAGE

General Order in Bankruptcy L, Sec. 11 24

Rules of the District Court, Rule 84 24

11 United States Code, Annotated, Sec. 67 25

11 United States Code, Annotated, Sec. 203 (n) 26

11 United States Code, Annotated, Sec. 203 (s) .....
..... 2, 6, 10, 18, 19, 23, 25, 27

28 United States Code, Annotated, Sec. 347 6

TEXTBOOKS AND ENCYCLOPEDIAS.

Collier, 1938 Supplement, 13th Ed., p. 290 19

Collier, 1938 Supplement, 13th Ed., p. 292 20

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1939.

No. .....

FRANZ J. BORCHARD and FRIEDA W. BORCHARD,

Petitioners,

vs.

CALIFORNIA BANK, a banking corporation, and CALIFORNIA TRUST COMPANY, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully file and submit this as their petition for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Ninth Circuit, rendered on the 2nd day of December, 1939, in Case No. 9205, [Tr. pp. 186-195]; affirming an order of

the District Court of the United States for the Southern District of California [Tr. pp. 153-155]. Petition for rehearing was duly filed and was denied on the 17th day of January, 1940, and opinion upon petition for rehearing was rendered [Tr. pp. 198-200]. Mandate has been stayed until the 23rd day of February, 1940, by proper order. The case has not yet been reported.

Statement of the Matter Involved.

The matter here involved is whether, while there is pending before the Conciliation Commissioner debtors' petition for stay of proceedings and rental order in proceedings under section 75 (s) of the Bankruptcy Act, as amended (11 U. S. C. A., Sec. 203 (s)), the District Judge, having ordered that the Conciliation Commissioner make no further order staying or purporting to stay proceedings against the debtors or any of their property pursuant to section 75 (s)(2) of the Bankruptcy Act pending determination of such petition, may grant a petition of secured creditor, based upon the grounds that the debtors have no equity in the property and for more than three years have been unable to financially rehabilitate themselves, for leave to foreclose or sell debtors' farming land under its deeds of trust, and dissolve all restraining orders against such sale; and also whether, in passing upon such petition for leave to sell, the appraisal made by the appraisers appointed by the Conciliation Commissioner was binding upon the court and the court erred in determining the market value to be a much lesser amount; and also whether the district court has jurisdiction to grant such petition without the appointment of a trustee and sale of the property under the control of the court.

Reasons Relied on for Allowance of Writ.

1. The decision of the Circuit Court of Appeals is in conflict with the decision of this Honorable Court in *John Hancock Mutual Life Ins. Co. v. Bartels*, 308 U. S. ....., 60 S. Ct. 221, 84 L. Ed. .....

2. The decision of the Circuit Court of Appeals involves an important question of bankruptcy law which has not been, but should be, settled by this Honorable Court:

Whether, while there is pending before the Conciliation Commissioner a proceeding to determine whether a stay order should issue pursuant to section 75, subsection (s), subdivision (2) of the Bankruptcy Act, the Court may dissolve all restraining orders and, upon petition of the secured creditor, order debtors' farming land sold under deeds of trust upon the ground that debtors have no equity in the property and for more than three years have been unable to financially rehabilitate themselves.

3. The decision of the Circuit Court of Appeals involves an important question of bankruptcy law which has not been, but should be, settled by this Honorable Court:

Whether the district court in proceedings under section 75 (s) of the Bankruptcy Act has jurisdiction to grant the petition of a secured creditor to foreclose or sell debtor's farming land without the appointment of a trustee and sale of the property under the control of the court.

Your petitioners present herewith as part of this petition a brief setting forth more fully their views upon the questions involved and also a transcript of the record of the Circuit Court of Appeals.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 9205, Franz J. Borchard and Frieda W. Borchard, appellants, vs. California Bank, a banking corporation, and California Trust Company, a corporation, appellees," to the end that said case may be reviewed and determined by this court and that the said decree of the Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief or remedy in the premises as to this Honorable Court may seem meet and just.

FRANZ J. BORCHARD and
FRIEDA W. BORCHARD,
Petitioners,

By LLOYD S. NIX,
Counsel.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1939.

No. .....

FRANZ J. BORCHARD and FRIEDA W. BORCHARD,

Petitioners,

vs.

CALIFORNIA BANK, a banking corporation, and CALIFORNIA TRUST COMPANY, a corporation,

Respondents.

BRIEF IN SUPPORT OF PETITION.

---

(1) The Opinions and Decisions of the Courts Below.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was filed December 2, 1939, in Case No. 9205 and appears in the transcript at pages 186-195, but has not yet been reported. The decree of the Circuit Court of Appeals, filed and entered December 1, 1939, appears in the transcript at page 196. The opinion of said court upon the petition for rehearing was filed January 17, 1940, and appears in the transcript at pages 198-200.

Petition for rehearing was filed by your petitioners on December 27, 1939, and was denied on January 17, 1940.

Order directing filing of opinion on petition for rehearing, correction of opinion of December 2, 1939, and denying petition appears in the transcript at page 197.

(2) Jurisdiction.

The jurisdiction of this Court is invoked under section 240a of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347). This petition is filed in accordance with Rule 38 of this Court.

(3) Statute Involved.

The provisions of section 75 (s) of the Bankruptcy Act, as amended (11 U. S. C. A., Sec. 203 (s)) pertinent herein are as follows:

> "Sec. 75 (s). Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as

provided for in this Act. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: Provided, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

"Sec. 75 (s) (1). After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part of parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

"Sec. 75 (s) (2). When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession. The first

payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property. Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental require payments on the principal due and owing by the debtor to the secured and unsecured creditors, as their interests may appear, in accordance with the provisions of this Act and may require such payments to be made quarterly, semiannually, or annually, not inconsistent with the protection of the rights of the creditors and the debtors' abiiity to pay, with a view to his financial rehabilitation.

"Sec. 75 (s) (3). At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: Provided, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and

after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: Provided, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this Act. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act.

"Sec. 75 (s) (4). The conciliation commissioner, appointed under subsection (a) of section 75 of this Act, as amended, shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of subsection (s) of section 75 of this Act, and continue so to act until the case has been finally disposed of. * * *"

(4) Statement of the Case.

Your petitioners are the debtors in proceedings instituted in the United States District Court of the Southern District of California under the provisions of Section 75 of the Bankruptcy Act, as amended (11 U. S. C. A., Sec. 203), and in which the debtors amended their petition and were adjudicated bankrupt under the provisions of Section 75 (s) of the Bankruptcy Act, as amended (11 U. S. C. A., Sec. 203 (s)). The respondents herein are the beneficiary and trustee under deeds of trust covering debtors' farming land.

On November 9, 1938, the creditor, California Bank, filed its petition for leave to sell all of said real property under the deeds of trust, upon the ground that debtors had no equity in said property and for more than three years have been unable to financially rehabilitate themselves [Tr. pp. 39-127]. Said matter was heard on December 5, 1938, and submitted to the Court for decision. On said date, the Court made an order that the Conciliation Commissioner make no further order staying or purporting to stay proceedings against the debtors or any of their property pursuant to Section 75 (s) (2) of the Bankruptcy Act, pending determination upon said petition to sell [Tr. pp. 149, 150]. On March 25, 1939, the Court made its order, from which appeal was taken, authorizing and permitting said California Bank to proceed to foreclose or

sell said property [Tr. pp. 153-155], having on March 20, 1939, handed down a memorandum of decision and order granting said petition [Tr. pp. 151-153]. No trustee was appointed by the court.

At the time that the petition for leave to foreclose or sell under trust deeds was filed by the California Bank, appellee herein, the proceedings instituted by the appellants herein under Section 75 and amended under Section 75 (s) of the Bankruptcy Act had gone forward to the extent that appraisers had been appointed by the Conciliation Commissioner, had made their report, hearings had been had, the Commissioner had announced his ruling and had requested the debtors' attorney to prepare the order for stay of proceedings under Section 75 (s), which order had been prepared and submitted, but had not been signed at the time the District Judge made his order restraining and enjoining the Commissioner from making such an order pending determination of the bank's petition for leave to foreclose [Tr. pp. 149, 150].

The debtors had filed their petition for appraisal and for possession of the property under Section 75 (s) on October 18, 1935, at the time of the first meeting of their creditors after reinstatement under Section 75 (s) as amended [Tr. pp. 14, 15].

Shortly after the reinstatement of the proceedings, the debtors made application for the payment to them of the

proceeds of the 1935 sugar beet crop and the 1935 Valencia orange crop, the creditor, California Bank, in its answer thereto claiming a lien upon all of the proceeds by reason of a chattel mortgage, raising the question of the constitutionality of the amended Section 75 (s) and praying that the proceedings be dismissed. The matter was heard by the Court and taken under submission, the District Judge under date of December 12, 1935, handing down his memorandum of conclusions and order that the chattel mortgage covered the 1935 crops [Tr. pp. 16-18]. The ruling upon the constitutional question was reserved and handed down by the District Judge under date of May 15, 1936 [Tr. pp. 18, 19].

During this period conflicting opinions as to the constitutionality of the amended Section 75 (s) were being handed down in the various districts and circuits and it was not until the decision of the United States Supreme Court, rendered March 29, 1937, in the case of *Wright v. Vinton Branch of Mountain Trust Bank*, 300 U. S. 440, 57 S. Ct. 556, 81 L. ed 736, that its constitutionality was established. During this same period and until the decision of the United States Supreme Court, February 28, 1938, in the case of *Aidair v. Bank of America Nat. Trust & Sav. Assn.*, 303 U. S. 350, 58 S. Ct. 594, 82 L. ed. 889, the authority of the Conciliation Commissioner to order the use of crop proceeds, in a case where there was a creditor holding both a crop mortgage and a trust deed upon the real property, for the maintenance and upkeep of the property, was in question. The case re-

versed the decision of the Ninth Circuit in *Bank of America National Trust & Savings Assn. v. Adair*, 90 Fed. (2d) 751, wherein Conciliation Commissioner Adair was held personally liable for such expenditures from crop proceeds.

Consequently various stipulations [Tr. pp. 21-33] were entered into, with the understanding that they should be without prejudice to the rights of either debtors or the bank, as to the administration of proceedings, operation of the farming property, and disbursement and use of crop proceeds. The stipulations were made in 1936, 1937 and 1938 and covered sums aggregating some $14,000.00.

In May, 1938, the bank announced that it would not agree to further use of crop proceeds for raising crops. Debtors then requested that the appraisal of their property proceed and stay of proceedings be granted [Tr. pp. 34, 35]. Appraisers were appointed by the Conciliation Commissioner and filed their report June 22, 1939 [Tr. pp. 35-38], appraising the parcels of real property at $33,000, $22,300, $12,000, and $20,000 respectively. Hearing thereon and for the purpose of fixing rental was set for July 26, 1938, before the Conciliation Commissioner. The appraisal had been approved, the Conciliation Commissioner had indicated his ruling, requesting counsel for the debtors to prepare an order leaving the debtors in possession under Section 75 (s) (2), and the proposed order had been submitted at the time appellee California Bank filed its petition for leave to sell all of said real property under deeds of trust [Tr. pp. 39-127].

(5) Specification of Errors.

A. Your petitioners respectfully assign as error the decision of the Circuit Court of Appeals that under the provisions of Section 75 (s) of the Bankruptcy Act as amended the court may grant a creditor's petition to sell debtors' farming land under its trust deeds while the conciliation commissioner has under consideration the making of a stay order under Section 75 (s) (2) and that the granting or denial of such a petition is at all times a matter for the exercise of the court's discretion.

B. Your petitioners further respectfully assign as error the decision of the Circuit Court of Appeals that the provisions of Section 75 (s) of the Bankruptcy Act as amended for appraisement have no bearing whatever on the right of the court to authorize foreclosure if at any time it appears that the debtor is unable to refinance himself within three years.

C. Your petitioners further respectfully assign as error the decision of the Circuit Court of Appeals that the District Court has jurisdiction to grant the petition of a secured creditor to foreclose or sell debtors' farming land under its trust deeds without the appointment of a trustee and sale of the property under the control of the court.

(6) Summary of the Argument.

Point I. While there is pending before the Conciliation Commissioner a proceeding to determine whether a stay order should issue pursuant to Section 75 (s) of the Bankruptcy Act as amended, the Court should not dissolve all restraining orders and, upon petition of a secured creditor, order debtors' farming land sold under deeds of trust upon the ground that debtors have no equity in the property and for more than three years have been unable to financially rehabilitate themselves.

(a) Section 75 (s) provides for stay of proceedings for three years after compliance with provisions as to request to remain in possession and appraisal, during which time debtor shall retain possession, provided he pays reasonable rental.

(b) A debtor adjudicated bankrupt under Section 75 (s) is entitled to have his proceeding for relief entertained and his property dealt with in accordance with that subsection.

(c) Definite course of procedure is prescribed by Section 75 (s).

(d) Provisions of the statute are mandatory.

(e) Three-year period commences from making of order staying proceedings under Section 75 (s) (2).

Point II. Appraisal of debtors' property having been made pursuant to said Section 75 (s), and no objection or exception having been taken thereto, such appraisal and the amount thereof were binding on the court in passing

upon the petition of secured creditor for leave to sell said property under its deeds of trust.

(a) Section 75 (s) provides for appointment of appraisers and specifies rights as to objections, exceptions and appeals.

(b) It is mandatory that party desiring review of an order made by referee file petition therefor, and that method of reviewing an order of a referee is exclusive.

(c) Procedure followed by creditor herein constitutes a collateral attack upon the appraisal made pursuant to the provisions of Section 75 (s).

Point III. In proceedings under Section 75 (s) of the Bankruptcy Act, the District Court has no jurisdiction to grant the petition of a secured creditor to foreclose or sell debtors' farming land without the appointment of a trustee and sale of the property under the control of the court.

(a) The filing of a petition for relief under Section 75 of the Bankruptcy Act subjects the farmer and all his property to the exclusive jurisdiction of the federal court.

(b) Upon amendment of debtor's petition under Section 75 (s) of the Bankruptcy Act, the rights and obligations of the parties are determined by the provisions of said Section 75 (s).

(c) Section 75 (s) (3) provides the only method of liquidation.

(d) Court has no jurisdiction to authorize sale before trustee is appointed.

POINT I.

While There Is Pending Before the Conciliation Commissioner a Proceeding to Determine Whether a Stay Order Should Issue Pursuant to Section 75 (s) of the Bankruptcy Act as Amended, the Court Should not Dissolve All Restraining Orders and, Upon Petition of a Secured Creditor, Order Debtors' Farm Land Sold Under Deeds of Trust Upon the Ground That Debtors Have No Equity in the Property and for More Than Three Years Have Been Unable to Financially Rehabilitate Themselves.

(a) Section 75 (s) Provides for Stay of Proceedings for Three Years After Compliance With Provisions as to Request to Remain in Possession and Appraisal, During Which Time Debtor Shall Retain Possession, Provided He Pays Reasonable Rental:

"Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain

possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this Act. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: Provided, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal."

Section 75 (s) *Bankruptcy Act*, 11 U. S. C. A. Sec. 203 (s).

"When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental, semiannually for that part of the property of which he retains possession. * * *"

Section 75 (s) (2) *Bankruptcy Act*, 11 U. S. C. A. Sec. 203 (s).

(b) A Debtor Adjudicated Bankrupt Under Section 75 (s) Is Entitled to Have His Proceeding for Relief Entertained and His Property Dealt With in Accordance With That Subsection.

John Hancock Mutual Life Ins. Co. v. Bartels, 308 U. S. ....., 60 S. Ct. 221, 84 L. ed. .....

(c) Definite Course of Procedure Is Prescribed by Section 75 (s).

"Subsection (s) of Section 75 as amended by the Act of August 25, 1935, prescribes a definite course of procedure."

John Hancock Mutual Life Ins. Co. v. Bartels, supra, 60 S. Ct. at page 223.

(d) Provisions of the Statute Are Mandatory.

Section 75 (s) (11 U. S. C. A. Sec. 203), *supra,* specifically provides for appraisal of debtor's property and that the debtor shall be allowed to retain possession, under the supervision and control of the Court, of any part or parcel or all of the remainder of his property (after setting aside to debtor his exemptions).

"Retention by Debtor. After the property is appraised and the debtor's unencumbered exceptions set aside, the referee shall order that any or all of the remainder of the property shall remain in the possession of the debtor, under the control of the court. *This requirement is mandatory and there are no grounds stated in the statute on which possession may be denied to the debtor."* (Italics ours.)

1938 Supplement, Collier, 13th Ed., p. 290.

"Stay of Proceedings by Secured Creditors. * * * It should be noted that the debtor is absolutely entitled to the three years' stay and possession of the property 'when the conditions set forth in this section have been complied with.' The only conditions seem to be the filing of a petition or answer asking for an extension of composition; failure to secure acceptance of the proposal or being aggrieved thereby; amendment of the petition or answer asking to be adjudged a bankrupt; and thereafter an appraisal under subdivision s. The creditors must submit to the stay, the debtor's possession under payment of rental, and his right to purchase at the appraised value, subject only to the right to have encumbered property sold at auction."

1938 Supplement, Collier, 13th Ed., p. 292;

Wright v. Vinton Branch of Mountain Trust Bank, 300 U. S. 440, 468, 57 S. Ct. 556, 81 L. Ed. 736.

Your petitioners respectfully urge that they have met all of the conditions required of them under Section 75 (s) of the Bankruptcy Act, to entitle them to possession of their real property and a stay order thereunder.

(e) Three-Year Period Commences From Making of Order Staying Proceedings Under Section 75 (s) (3).

"In support of the contention that the legislation is unconstitutional, it is pointed out that the delay in the enforcement of the mortgage under section 75 of the Bankruptcy Act as amended by subsection (s) may exceed the term of three years; that months may be consumed in the effort to obtain a composition or extension of the debtor's obligations with the consent of the creditors; that when a petition is filed praying for the relief outlined in subsection (s) a further period of months may be consumed in having the property appraised and putting the debtor in the position which he must occupy before the stay is granted;"

Wright v. Vinton Branch of Mountain Trust Bank, 300 U. S. 440, 468, 57 S. Ct. 556, 81 L. Ed. 736.

The respondent bank has contended that the provision of paragraph 3 of Section 75 (s) "If . . . the debtor at any time . . . is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided in this Act" does not refer to the three-year period under the stay order, but in this case allows a sale outside of bankruptcy to be authorized by the court, during the pendency before the Conciliation Commissioner of the matter of the making of a rental order and stay of proceedings. Petitioners respectfully submit that the "three years" mentioned in the passage from the act above

quoted is the "three-year" period of the stay to be ordered under Section 75 (s) (2).

> "* * * paragraph 3 also provides that 'If . . . the debtor at any time . . . is unable to refinance himself within three years' the court may close the proceedings by selling the property. This clause must be interpreted as meaning that the court may terminate the stay if after a reasonable time it becomes evident that there is no reasonable hope that the debtor can rehabilitate himself within the three-year period."
>
> *Wright v. Vinton Branch, supra,* at page 462.

But, petitioner respectfully submit that this clause does not authorize the court to order that no stay be ordered by the Conciliation Commissioner until the court shall have passed upon a petition for leave to sell under creditor's trust deeds, as was done in the present case. The decision rendered herein rests upon such an interpretation of this clause, the court holding that the granting or denial of a petition for authority to foreclose is at all times a matter for the exercise of the court's discretion. [Tr. pp. 189, 199, 200.]

It is respectfully submitted that the court in the present case failed to follow the orderly procedure which is the scheme and mandate of the statute and which is outlined in detail in the *Bartels* case, *supra*, 60 S. Ct. at page 244. It is further submitted that there is no authority for the granting of such a petition after the adjudication under Section 75 (s) and before the making of the rental order.

II.

Appraisal of Debtors' Property Having Been Made Pursuant to Said Section 75 (s), and No Objection or Exception Having Been Taken Thereto, Such Appraisal and the Amount Thereof Were Binding on the Court in Passing Upon the Petition of Secured Creditor for Leave to Sell Said Property Under Its Deeds of Trust.

(a) **Section 75 (s) Provides for Appointment of Appraisers and Specifies Rights as to Objections, Exceptions and Appeals.**

"* * * Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this Act. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: Provided, That in proceedings under this section, either party may file objections, exceptions and take appeals within four months from the date that the referee approves the appraisal."

Section 75 (s) *Bankruptcy Act,* 11 U. S. C. A. Sec. 203 (s).

No objections, exceptions or appeal from the appraisal herein were taken, and your petitioners respectfully urge that the procedure followed by the respondent bank constituted a collateral attack upon the appraisal made pursuant to order and appointment of the Conciliation Commissioner and of the proceedings before the Conciliation Commissioner for the fixing of rentals and stay of proceedings.

By General Order in effect at the time of the filing of the petition for leave to sell herein, it was provided:

> "In so far as is consistent with the provisions of Section 75 of this general order, the conciliation commissioner shall have all the powers and duties of a referee in bankruptcy and the general orders in bankruptcy shall apply to proceedings under said section."
>
> General Order L, Section 11;
>
> See also present General Order 50 (11).

General Order XXVII, likewise in effect at the time of the filing of the petition to sell herein, is mandatory in requiring a petition of the party desiring a review of an order made by a referee and, in the absence of such a petition, the court has no authority to review the action of the referee.

> Section 2 (10) *Bankruptcy Act*, 11 U. S. C. A., Sec. 11 (10);
>
> *In re Russell* (D. C., Cal.), 105 Fed. 501;
>
> *In re Lyders* (D. C., Cal.), 16 Fed. Supp. 213; affirmed 88 Fed. (2d) 9.

Rule 84 of the rules of the local District Court, also then in effect, required that

> "a petition for a review of an order made by a referee as provided in General Order XXVII of the General Orders in Bankruptcy must be filed with the referee within ten days from the date of notice of such order."

It has been held that should a person fail to observe a supplemental rule placing a time limit (ten days) upon the filing of the petition for review, he forfeits the advantage which it affords him. Of this advantage he cannot later avail himself by a writ of certiorari, appeal or other indirect process, for the method of reviewing an order of

a referee prescribed by General Order XXVII and the supplemental rule of the District Court is exclusive.

In re David (C. C. A. 3), 33 Fed. (2d) 748; certiorari denied 280 U. S. 514, 50 S. Ct. 19, 74 L. Ed. 585.

This provision as to review is now incorporated as Section 39c in the Bankruptcy Act, as amended by the Chandler Act (11 U. S. C. A., Sec. 67).

The presentation to the district judge of the bank's petition for leave to foreclose or sell under its trust deeds, in which petition were set forth the valuations, totaling $87,300.00, at which the respective parcels were appraised pursuant to order of the Conciliation Commissioner, [Tr. p. 53], and wherein it was also alleged that the property securing the loans could not be sold for a sum in excess of $65,000.00, supported by affidavits as to market value [Tr. pp. 129-142], was an indirect attack upon the appraisal "at its then fair and market value" (Sec. 75 (s) (11 U. S. C. A., Sec. 203 (s)),) which had been had in said proceedings pursuant to the order of the Conciliation Commissioner.

Your petitioners respectfully submit that the appraised value of $87,300.00 reported by the appraisers appointed by the Conciliation Commissioner was binding upon the court, no objection or exception having been taken thereto and no appeal having been taken therefrom in the manner provided in said Section 75 (s), that the district judge erred in determining the market value to be $68,552.00, and further that the Circuit Court erred in its decision that the provisions of Section 75 (s) of the Bankruptcy Act for appraisement of debtor's property have no bearing whatever on the right of the court to authorize foreclosure if at any time it appears that the debtor is unable to refinance himself within three years.

III.

In Proceedings Under Section 75 (s) of the Bankruptcy Act, the District Court Has No Jurisdiction to Grant the Petition of a Secured Creditor to Fore-Close or Sell Debtors' Farming Land Without the Appointment of a Trustee and Sale of the Property Under the Control of the Court.

(a) The Filing of a Petition for Relief Under Section 75 of the Bankruptcy Act Subjects the Farmer and All His Property to the Exclusive Jurisdiction of the Federal Court.

Section 75 (n) *Bankruptcy Act*, 11 U. S. C. A., Sec. 203 (n);

Kalb v. Feuerstein, ... U. S. ....., 60 S. Ct. 343, ... L. Ed. .....

(b) Upon the Amendment of Debtor's Petition Under Section 75 (s) of the Bankruptcy Act, the Rights and Obligations of the Parties Are Determined by the Provisions of Said Section 75 (s).

Wright v. Vinton Branch of Mountain Trust Bank, supra.

Filing of mortgagor's petition under Bankruptcy Act for extension of time to pay his debt deprives mortgagee of the remedies under the deed of trust and notes secured thereby, and mortgagee can proceed only as provided by such Act.

In re De Tamble, 88 Fed. (2d) 893.

(c) Section 75 (s) (3) Provides the Only Method of Liquidation.

The only method for liquidation provided by Section 75 (s) is by the appointment of a trustee and sale of the property under the jurisdiction of the court.

Section 75 (s) (3), *Bankruptcy Act*, 11 U. S. C. A., Sec. 203 (s).

John Hancock Mutual Life Insurance Co. v. Bartels, supra.

(d) Court Has No Jurisdiction to Authorize Sale Before Trustee Is Appointed.

The bankruptcy court, or referee, in proceedings under the general Bankruptcy Act, cannot lawfully authorize a sale under trust deed before a trustee in bankruptcy is elected, and if it does so, the sale is void; and the referee has no power, and so no jurisdiction, to enter an order for a sale outside the bankruptcy court of the encumbered real estate of the bankrupt estate prior to the election of a trustee.

Comer v. John Hancock Mut. L. Ins. Co: (C. C. A. 8), 80 Fed. (2d) 413, 417.

Conclusion.

Petitioners, in conclusion, urge upon this Honorable Court that the decision of the Circuit Court of Appeals is at variance with the decision of this Honorable Court in *John Hancock Mutual Life Ins. Co. v. Bartels,* 308 U. S. ....., 60 S. Ct. 221, 84 L. Ed. ....., and that an important question of bankruptcy law, concerning proceedings for relief under Section 75 (s) of the Bankruptcy Act, is involved; and it is therefore submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers, in order that the errors herein pointed out may be corrected, that the law may be properly and authoritatively defined, and that the order of the District Court and the decree of the Circuit Court of Appeals be reversed in order that justice may be done to petitioners, and that to such end a writ of certiorari should be granted.

Respectfully submitted,

LLOYD S. NIX,
Counsel for Petitioners.